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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 231

BIBL HATAHLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 428–438) is reported at 220 F. 2d 666. The oral opinion (R. 413–420), findings of fact and conclusions of law (R. 18–48) of the District Court are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1955 (R. 438). A petition for rehearing was denied on April 15, 1955 (R. 439). The petition for a writ of certiorari was filed on July 13, 1955, and was granted on October 10,

1955 (R. 440). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act because its agents instituted, and participated in, the enforcement on the federal range of a Utah statute for the elimination of abandoned horses which resulted in the confiscation of horses and burros claimed by the Indian petitioners and, if so, whether the judgment awarding $100,000 damages can be supported.

2. Whether the District Court had jurisdiction in a tort claims case to enjoin the United States and its agents from interfering with activities of Indians upon or from disposing of the public lands involved.

STATUTES AND REGULATIONS INVOLVED

The majority of the pertinent state and federal statutes and regulations are set out in the Appendix to petitioners' brief, pp. 52–58. Other pertinent provisions of state and federal laws are printed in the Appendix to this brief, *infra*, pp. 67–71).

STATEMENT

Petitioners, Navajo Indians, instituted this action on March 20, 1953, under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), to recover $100,000 as damages for the loss of 116 horses and 38 burros which they alleged, were owned by

them and were taken wrongfully and unlawfully from the federal range in Utah and killed or sold by agents of the Bureau of Land Management, Department of the Interior (R. 5–7, 280). The complaint averred that the taking was willful as part of a plan, in collusion with white livestock licensees, to drive petitioners from the area involved, which they claim as their ancestral home (R. 6–7). The facts may be summarized as follows:

The area involved is public domain administered as part of Utah Grazing District No. 6 under the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U. S. C. 315 *et seq.* (R. 20). It is in lower San Juan County in the southeast corner of the State of Utah and directly north of the Navajo Indian Reservation (R. 20). The Indians on the reservation have in the past tended to come over into this area with their livestock (R. 142–143, 275). Petitioners, comprising eight families, claim, however, that they have always lived in the area involved, not on the reservation (R. 7, 18).

In February 1950, the United States instituted an action in the District Court below to enjoin certain Navajo Indians, including some of petitioners, from trespassing and grazing livestock upon this area (R. 29). The District Court dismissed the complaint on the grounds that (1) an injunction against the use of the lands would require the defendants to leave their homes, fields

and grazing grounds, and that the court had no authority to allot to the defendants any other place to live; (2) the court had no means of compelling obedience to an injunction, if issued; (3) it was the problem of the United States Department of the Interior and the Bureau of Land Management, and not that of the courts, to solve the conflict. 93 F. Supp. 745. The Court of Appeals reversed the dismissal and reinstated the complaint, in *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (August 30, 1951). Coincidentally, several white stockmen who had licenses from the Government to graze livestock in this area sued in the Utah state court to enjoin certain Navajo Indians, including some of the petitioners (R. 404), from trespassing and grazing their livestock there. The Indians were enjoined. *Young* v. *Felornia,* 244 P. 2d 862 (Utah, May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952). The Utah court held that the Navajo Indians had no valid claim to use the area. It expressly rejected the claim of this group that it was a distinct band of Navajos having rights, based upon immemorial occupancy, to use this area outside the Navajo Reservation established by Congress as the "permanent home" for "the whole people of said nation or tribe." However, the Indians, including petitioners, continued to use the area (R. 142–143, 275).

About July 1, 1952, after those decisions of the Court of Appeals and the Supreme Court of

Utah but before final disposition of the suits, Dale Kinnaman, Range Manager of Grazing District No. 6 for the Bureau of Land Management, upon reports from his assistants, Dee Black and Robert Krumm, that there were many abandoned horses on the range, decided to conduct a round-up and elimination of such horses in accordance with the usual practice under the provisions of Title 64, Chapter 2, Sections 1–6, Utah Code Annotated (1943)[1] (R. 98, 119–120, 132–133, 335). At the same time, he instituted an identical program in Grand County, Utah, which is Grazing District No. 9, also under his supervision, and far to the north of this area (R. 335). As to San Juan County, Utah, he secured the approval of the members of the Board of Commissioners (R. 30–33, 43, 147–153, 358–359, 375–376, 383, 385–386, 415), and, commencing on July 10, 1952, posted and published the notices required by the Utah statute (R. 31–32, 79, 86–87, 98, 111–112, 306–307). The notices announced that the elimination drive would commence on August 10, 1952, and stated that "All owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within thirty (30) days from the date given below [July 10, 1952], a description of such horses and the brands and marks thereon" (R. 31).

[1] The provisions of the 1943 Utah Code are the same as those of the 1953 Utah Code printed at pages 55–58 of petitioners' Appendix to their brief.

Commencing on September 19, 1952, instead of on August 10, 1952, as originally announced, and continuing periodically up to the date of the filing of this action on March 20, 1953, the agents of the Bureau of Land Management, assisted by the local sheriff and white livestock operators, rounded up the horses and burros involved here and a few others (R. 7, 34–35, 72–73, 81–83, 120–121, 352–353). The animals were herded together on the range, loaded into trucks and hauled to corrals where they were kept for periods up to two weeks (R. 134–137). Nine animals were shot on the range in the gathering process because they were feeble or injured (R. 89, 126, 296, 301). Fifteen of the horses were sold locally (R. 144, 333–334). Several were redeemed by Indians (R. 83, 144, 299). A few were returned to white men (R. 89, 116, 143). The rest, being unclaimed and unable to be sold locally, were transported by trucks to the Kuhni Packing Company near Provo, Utah, a distance of 350 miles, and sold for $1\frac{1}{15}$ cents to 3 cents per pound (R. 93, 139, 140, 292–296). A total of $1,700 was received for the animals (R. 34).

About three months after this suit was filed, in connection with the earlier trespass action by the United States, the Bureau of Land Management officials in Salt Lake City asked Dale Kinnaman for a report on whether the Indians were still grazing sheep on the federal range. He sent Dee Black onto the range and, upon Black's report

that they were not, furnished the Salt Lake City office with that information. (R. 114–115.) The District Court then dismissed that trespass action on June 27, 1953, for the reason that "it appearing to the Court upon representations by representatives of Bureau of Land Management that the defendants have returned to the Reservation and that there are no more trespassers, the questions involved in this case therefore being moot, it is ordered and adjudged that the above entitled cause be, and the same is hereby dismissed" (R. 29). This was some seven months after this Court had declined to review the state court judgment enjoining some of petitioners from using these lands.

Following subsequent trial of the instant case, at which details of the round-up were adduced and values for the horses and the extent of consequential losses were testified to, the District Court held that the United States was liable and awarded appellees $100,000, the amount sought, as damages for loss of the horses and burros, consequential losses, and mental pain and suffering (R. 38–41, 45–47). The reasons stated for the court's decision were (1) that the round-up and destruction of petitioners' horses and burros by the agents of the Government were willful, wanton and malicious and part of a plan to drive petitioners from the range; (2) that, because the Taylor Grazing Act and the regulations issued thereunder (Pet. Br. 53–54) had provisions

for dealing with trespassing livestock, the Utah statute relative to the elimination of abandoned horses was not applicable; and (3) that, even if the Utah statute were applicable, its provisions had not been followed because, the court believed, (a) the Board of County Commissioners did not officially authorize the elimination program, (b) the Advisory Board[2] which was named by the Commissioners to direct the program did not officially accept the responsibility until October 9, 1952, after a number of horses had already been killed, (c) the horses were not abandoned within the meaning of the Utah statute, and (d) no effort was made to return them (R. 41–48). Judgment was accordingly entered on January 30, 1954 (R. 49–50). In addition, although such relief had never been requested, the District Court enjoined the United States, its agents and employees from further interfering with petitioners and from disposal of any of the public lands involved and reserved jurisdiction to try petitioners' claim to property rights in the area (R. 47–49).

On appeal by the United States, the Court of Appeals reversed. It held that the provisions of

[2] The Taylor Grazing Act provides for the appointment by the Secretary of the Interior, from among the permittees, of a group of local stockmen, known as an Advisory Board, the functions of which are to offer suggestions and advice to the Government as to which applicants should be granted permits, and, in general, to advise in the management of the grazing district from which they are elected (R. 20–21). 43 U. S. C. 315 o–1, *infra*, pp. 69–70.

the Taylor Grazing Act did not preclude, but authorized, use of the local police statutes and that the provisions of the Utah statute were followed (R. 428–438). Consequently, it found it unnecessary to pass upon several other questions raised by the appeal (R. 433; see also statement of points, R. 1–5).

SUMMARY OF ARGUMENT

I

As stated by the Court of Appeals, the District Court tried this case with "maximum emotion and a minimum of judicial impartiality." The findings of fact, most of which the appellate court found it unnecessary to consider in detail, cannot reasonably be taken at face value. When the case is viewed in the light of all the pertinent facts, it becomes plain that the factual contentions of petitioners are unsupportable. This is especially clear with respect to the alleged plot or conspiracy among the Federal officers, State officials and private graziers.

II

A. The Court of Appeals correctly held that the United States is not liable here because the Taylor Grazing Act, by expressly preserving the police power of the respective States on the public domain, authorized use of the Utah statute providing for the abatement of the nuisance of abandoned horses. There is no conflict between the

two statutes as to preference rights, notice provisions, or subject matter. Petitioners, being trespassers, have no preference rights under the Taylor Act. Moreover, by disobeying permits once issued to them, petitioners forfeited the rights in the public domain they seek to assert here. The written notice required by regulation under the Taylor Act for trespasses by known owners of livestock has no application to abandoned horses. The Taylor Act does not deal specifically with the means of abating the nuisance of abandoned hores. The Utah statute condemns such horses as a "public menace." The abatement of that nuisance is an exercise of the "narrow" police power which petitioners concede was reserved to the States.

B. The provisions of the Utah statute were followed. The Board of County Commissioners validly authorized the program, and the irregularity petitioners assert in the Board's proceedings is insignificant. Under any view, it has no tendency to establish and could not have promoted the vicious plot found by the District Court. Nothing which the statute was designed to protect was infringed. The world was notified in exact conformity with the statute. Beyond the requirements of the statute, petitioners were specifically notified and more time than the statute required was allowed between the notice and the round-up.

The horses were abandoned within the terms of the Utah statute. Neither the findings nor the evidence supports petitioners' assertions that the horses bore recorded brands and that their ownership was known. In any event, the Utah statute is clear that knowledge of ownership is immaterial and that the fact of recorded brands is equally immaterial where an owner does not prove the fact in response to the statutory notices as required. These are eminently reasonable means of combating the problem of uncontrolled animals on the western ranges.

C. Petitioners are mistaken in their assumption (Br. 34–41) that they can recover on the ground that, if the state statute was properly invoked and fully complied with, its application to them was unconstitutional. Even on the faulty premise that invalidity of state proceedings could create a claim against the Federal Government, this argument fails for want of a showing that petitioners' constitutional rights were invaded. The record shows that they had ample actual notice of the proceedings under the Utah statute. And their charge of discrimination in applying the statute is not substantiated.

III

If petitioners had succeeded in showing a departure from either the Taylor Grazing Act or the Utah abandoned horse statute, they would

still have failed to state a claim on which relief could be granted against the United States under the Federal Tort Claims Act.

1. At the outset of their contentions in this Court petitioners pointed out (Pet. 2, fn. 2) that there is "no question here as to the authority of the Government agents to take the action complained of by petitioners." They do not and cannot show how the intentional performance of authorized action (there is no claim of negligence) could be "negligent or wrongful" under the Tort Claims Act. And assuming the words "negligent or wrongful" could somehow apply in such a case, this suit would nevertheless fall within the Tort Claims Act exemption (28 U. S. C. 2680) for "governmental functions" (*Dalehite* v. *United States*, 346 U. S. 15, 32) or exertions of "governmental authority in a manner which legally binds one or many" (*id.* at 59, dissenting opinion). Taking only the narrower view of the exemption stated in the *Dalehite* dissent, this is a case where the officials themselves would be exempt from liability (under the many cases like *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949), and "[t]he exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official." *Dalehite, supra*, at 60 (dissenting opinion).

2. Insofar as petitioners seem alternatively to suggest that the government agents in this case acted wholly without authority, in a conspiratorial plot stemming from personal malice, the actions of which they complain could not be "within the scope of [the] office or employment" of these agents, as is required for recovery under the Tort Claims Act. Apart from the strict rules of agency under federal law, this would be true as a matter of Utah law (*Barney* v. *Jewel Tea Co.*, 104 Utah 292, 296; *Sweatman* v. *Linton*, 66 Utah 208, 213), which is applicable on this point (*Williams* v. *United States*, 350 U. S. 857). The same conclusion follows from the fact that the federal officers here acted under state authority, by direction of state officials, and thus, on petitioners' own theory that such action was unauthorized, were outside the scope of their federal employment. *Sanchez* v. *United States*, 177 F. 2d 452 (C. A. 10); *Gleason* v. *Salt Lake City*, 94 Utah 1.

IV

As the Court of Appeals said (R. 433), the amount of damages the District Court awarded "appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered * * *." The District Court plainly awarded punitive damages, contrary to 28 U. S. C. 2674, which forbids imposition of such liability upon the

United States. Thus, even assuming liability to any extent, the District Court's judgment could not be reinstated.

V

Petitioners sought no injunction, but the District Court nevertheless enjoined the United States and its agents from (1) interfering with petitioners and their livestock in the use of the public domain or (2) disposing "of any of said lands or any interests therein" until the court might determine the respective rights of the parties in this property. Petitioners concede (Br. 48–49) that the injunction against the United States was improper, and the injunction against the agents (who were not defendants in this action, which was solely one for damages under the Tort Claims Act against the United States) falls with this plainly correct concession.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY REGARDED THE FINDINGS AND DECISION OF THE DISTRICT COURT AS BEING INFLUENCED BY AN UNWARRANTED ATTITUDE OF HOSTILITY TO THE GOVERNMENT'S CASE

Petitioners rely in every point of their brief on the findings of the District Court. Those "findings" are argumentative, inflammatory, and sweeping. They contain statements so derogatory to respondent that it is deemed essential, at the outset, to show the unwarranted hostility of the

court from which those findings and the decision derived. The Court of Appeals declared, with respect to "the court's findings and decision," that "the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality" (R. 432–433). As this Court said of similarly "profuse, prolific, and sweeping" findings in the tort action of *Dalehite* v. *United States*, 346 U. S. 15, 24, "no proper review could be exercised by taking the 'fact' findings of 'negligence' at face value." Thus, the following facts and circumstances are important preliminaries to a consideration of the legal issues in this case.

The area of public lands involved here is desert (R. 20, 25). Forage is sparse (R. 20, 27, 37). Therefore, the number of animals using it must be carefully controlled. A serious drought had existed for four or five years prior to the time involved here (R. 106, 191). The holders of grazing permits had been requested "to take as much non-use as they possibly could" (R. 107). The number of horses loose on the range without authority had increased to hundreds (R. 133). There had never before been so many (R. 119–120). Horses tend to ruin the range (R. 90). Control of the number of horses on the public domain by destroying the abandoned ones is customary and frequent practice in this area and in the surrounding country (R. 98, 119–120, 132, 335). It is the duty of the Range Manager and his assistants thus to protect the range, and they

would be remiss in their duty if they did not eliminate abandoned horses (R. 24, 90, 98, 119–120, 402–403). The permitting by range officials of unauthorized grazing has been held to constitute a cause of action by permit holders against the United States under the Federal Tort Claims Act. *Oman* v. *United States*, 179 F. 2d 738 (C. A. 10), involving another grazing district in Utah.

Overlooking those requirements of the area and the obligation of the Range Manager, the District Court read into every step of the elimination program a calculated, vicious plot to "destroy the ability, if not the will of plaintiffs, to further inhabit this range" (R. 45). Commencing the case with that conviction[3] (R. 87–88, 99, 100), the court conducted the trial in a manner hostile and prejudicial to the Government's case and demonstrably allowed inferences from its conviction, rather than from all the facts, to determine its findings.

The court continually characterized the round-up and elimination program as "horrible," "monstrous," "atrocious," "inhuman," "cruel," "cold-blooded depredation" and without a "sense of decency"[4] (R. 222–227, 326). It asserted that

[3] See pp. 3–4, *supra*, for the grounds of the same district judge for dismissing before trial the complaint in the *Hosteen Tse-Kesi* case, a decision reversed by the Court of Appeals.

[4] Typical of the court's attitude and accuracy is its finding that a horse's leg was "sawed off" (R. 35; Br. 8). The sole evidence on the subject is the following testimony (R. 301):

"these people have been treated worse than dogs" (R. 225). It interrupted the trial to tell stories of the treatment of dogs (R. 224–225, 330–331). It urged people through the public press to send money, food and clothing "through my office" to the petitioners (R. 224, 227, 246–247, 277–278, 281). It continually directed petitioners' counsel in the development of petitioners' case (R. 82, 87–88, 96, 97, 98, 99–111, 198–227, 230–236, 248–249, 253, 275–276, 278, 282–289, 361–367, 378–379, 385–389, 403–404), while limiting or depreciating the Goverment's case (R. 80, 84, 87–88, 160–161, 252, 269, 338, 343, 353, 361, 367–368, 379–382, 385–389, 403–404, 406–407).

The court led the evidence off into the history of the Navajo Indians and their dealings with the United States over land (R. 202–209, 215–219, 271–279, 318–321), and drew upon its own recollection of that history (R. 206–207, 216–217, 271–275), as well as upon its own opinion that the Indian problem had been mismanaged by the Bureau of Indian Affairs and the Bureau of Land Management (R. 217–227, 274), to support its conviction as to the motives of the Government's agents. Before the Government had presented any evidence the court stated that "if I had the authority in the executive department of

"One of them had his foot through the rigging, and we couldn't possibly get him out, and he was just about dead, anyhow, so we had to shoot him and shoot his foot off to get him out of the trucks."

the government I would knock somebody's heads together in the Bureau of Land Management and in the Bureau of Indian Affairs—and I would get this thing straightened out. And it wouldn't be Indians' heads that were knocked together, I'll tell you that" (R. 223). It charged those two agencies with being "derelict in their duties" (R. 223). The Government did not seek to controvert or make a record upon any of those matters because they are not within the issues presented. Nevertheless, the District Court conducted this case largely as a hearing on the administration of Indian affairs. It must be presumed that the Department of the Interior is fully aware of the true situation with respect to these Indians, and it is not chargeable with mismanagement on this one-sided picture before an unauthorized forum. For the court usurped the administrative function by using this action to make amends to the Indians for what it conceived were mistakes in administrative policy. And, as the Court of Appeals observed (R. 433), "the judgment appears to be more for punishment * * * rather than for the damages suffered * * *."

Also, the trial court severely criticized the agents of the Government and threatened them with contempt proceedings for conducting this round-up before the Government's trespass action in *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d

518 (August 30, 1951), had been finally disposed of by the District Court on remand (R. 29, 77–78, 84–85, 114–115, 217–218, 221). It expressed no criticism of the fact that, during the pendency of the same action, petitioners, some of whom were defendants in that action, and others came into the area with a "big invasion" of sheep and cattle (R. 132, 275). It expressly minimized the fact that, prior to the round-up, some of petitioners had been enjoined from using the area by the Supreme Court of Utah in *Young* v. *Felornia,* 244 P. 2d 862 (Utah, May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952), which, upon a full consideration of the matter, decided that the Indians had no right whatever to be in the area[8] (R. 84, 226, 403–404).

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[8] There runs through petitioners' argument the theme that they have rights in this area based upon their asserted immemorial possession. They draw support for this assertion from the finding of the District Court to that effect. That finding is, of course, outside the issues of this case. Petitioners' claim was shown to be fallacious by the two state courts before whom that issue was properly and fully presented. *Young* v. *Felornia, supra.* As in the findings of the District Court, petitioners' only answer to that case is to ignore it.

The District Court's charge (R. 45) that the United States did not intend to allow petitioners to have their claim to possessory rights tried in court is indeed strange in view of that court's treatment of the Government's suit wherein that claim was the very issue sought by the Government to be litigated. The delay caused by the necessary appeal from the District Court's novel decision "of its own motion" (191 F. 2d at p. 519) resulted in the contemporaneous state court

The court forbade counsel for the Government to talk to the Government's own witnesses, even outside the courtroom, for a period (R. 111).* Throughout the trial, it excluded all witnesses for the Government from the courtroom except while testifying and forbade them to talk to each other (R. 108–109, 111, 159–160). As government counsel stated in protest to the court (R. 160), without the advice of his own witnesses during the testimony he was unable effectively to cross-examine the petitioners and their witnesses. The court, however, called this objection "captious" and "pretty small business" and persisted in the prohibition (R. 160–161). No such restrictions were imposed upon petitioners or their counsel.

We submit that this hostile attitude of the District Court, manifest from the beginning, was unwarranted, that it adversely affected the presentation of the Government's case, and that it erroneously influenced the findings and decision. Accordingly, those inflammatory "findings", upon which petitioners base their case here, may not fairly be taken at face value. We submit further, however, that even with those findings petitioners' case must fail as a matter of law.

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action being decided first, settling the title question. Since the Indians' claim was thus adjudicated, no further trial of that issue was appropriate.

* The printed record omits the fact, which appears at page 90 of the typewritten reporter's transcript, that a noon recess intervened between the court's order and its rescission.

III

THE UNITED STATES IS NOT LIABLE FOR THE DESTRUCTION OF PETITIONERS' HORSES AND BURROS BECAUSE IT WAS DONE PURSUANT TO LAW

A. THE TAYLOR GRAZING ACT DOES NOT SO OCCUPY THE FIELD AS TO MAKE THE UTAH STATUTE UNAVAILABLE

As the Court of Appeals held (R. 435), there is nothing in the Taylor Grazing Act indicating that Congress intended that the entire field of law and management of the public domain was to be preempted by the United States. On the contrary, the Act specifically provides that the local law shall not be suspended. The purpose of the Act is to stabilize the livestock industry and to permit the use of the public range by qualified permit holders. It seeks to provide for the most beneficial use of the public range and to protect grazing rights. *Chournos* v. *United States,* 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977; *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308 (C. A. D. C.). It declares in Section 1 (43 U. S. C. 315, *infra,* pp. 68–69), that "Nothing in this Act shall be construed in any way * * * as limiting or restricting the power or authority of any State as to matters within its jurisdiction." In Section 16 (43 U. S. C. 315n; Pet. Br. 53) it preserves the application of "the police power of the respective States" and local statutes "enacted as regards public health or public welfare." The regulations issued under the Act have long

acknowledged the availability of local law by providing for "exercise [of] the proprietary right of the United States in the Federal range, under local impoundment law and procedure" (43 CFR 161.11(b); Pet. Br. 54).

The police power of the state extends over the federal public domain within a state unless Congress has determined to deal exclusively with the subject. *Omaechevarria* v. *Idaho*, 246 U. S. 343; *Colorado* v. *Toll*, 268 U. S. 228; *International Bridge Co.* v. *New York*, 254 U. S. 126; cf. *Garcia* v. *Sumrall*, 58 Ariz. 526, 121 P. 2d 640. It seems evident, in view of the express reservation of the applicability of the police power of the states to the federal range, that Congress did not intend to deal exclusively with such normal subjects of police power as nuisances on the range. The 1927 Utah statute was applicable to the public domain prior to the Taylor Grazing Act of 1934 (R. 42, 434). It has been invoked often since enactment of the Taylor Grazing Act (R. 73, 98, 104, 106, 119–120, 132, 335, 402–403).

Petitioners' attempt to render the Utah statute inapplicable by establishing a conflict with the Taylor Act is unavailing. On this problem they contend (1) that the Taylor Grazing Act gave them grazing rights with which application of the Utah statute interfered (Br. 15–16); (2) that the notice provisions of the Utah statute conflict with the provisions of the Taylor Grazing Act for notice to trespassers (Br. 16–17); (3) that the

state police power exercised under the Utah statute was rendered inoperative by the federal Act, despite the express provision of the latter saving state police powers (Br. 17–22); and (4) that the federal agents lacked authority to invoke the state's police power to clear the range of abandoned horses the presence of which was injurious (Br. 22–24). None of those contentions is correct.

1. The Taylor Act conferred no rights on petitioners. They are not helped by the provisions of the Act and of the Federal Range Code (Secs. 3, 5, 43 U. S. C. 315b, 315d; 43 CFR 161.6(a), 161.2(n)) that preference shall be given in the issuance of grazing permits to "bona fide occupants" of the federal range and that free permits shall be given for "livestock kept for domestic purposes" (permits which are valid "in the immediate neighborhood of the residence of the licensee"). Obviously, occupants whose claims to use the public domain have been properly denied by the United States, as were the claims of these petitioners (*supra*, pp. 3–4, 19–20 (fn. 5); *infra*, pp. 23–25), are not "bona fide" in their continued, defiant occupancy. And the use of horses to herd cattle over a large area of the range for other than domestic uses falls outside the provision for free "domestic purposes" permits, which petitioners neither had nor claimed to have.[1]

[1] Petitioners did not assert any claim to permits under these preference provisions in the courts below. Certainly, the judgment of the District Court cannot be sustained nor

The fact that petitioners were given permits as a matter of grace for a time in the past is not significant. Those permits were revoked for constant violation of their terms (R. 71–73, 101–102, 106). Even assuming any right in petitioners, it was thereby forfeited. For many years prior to the action complained of here, petitioners were told to leave the area for the reservation and were denied permits (R. 21, 30). The boundary lines of a reservation for Navajos are meaningless if the Indians must nevertheless be accorded the right to graze surrounding lands.

Petitioners stand on their assertion of a legal right, based on "ancestral" occupancy, to live on and use this area of the public domain adjacent to the Navajo Indian Reservation. But against this position are the facts (a) that the Navajo Reservation was established by Treaty of June 1, 1868, 15 Stat. 667, as the "permanent home" for "the whole people of said nation or tribe", a treaty by which the Navajos agreed to "relinquish all right to occupy any territory outside their reservation;" (b) that Congress enlarged the reservation along its northern boundary up to, but excluding, the area here in dispute by the Act of March 1, 1933, 47 Stat. 1418; and (c)

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can the administrative officials be charged with dereliction of duty absent any showing that petitioners ever sought or were denied such preferential permits.

[1] Petitioner Bill Hatahley is a member of the Navajo Tribal Council on the reservation (R. 243).

that Navajo Indians, including some of petitioners, have been enjoined from using the area by the decision in *Young* v. *Folornia*, 244 P. 2d 862 (Utah, May 21, 1952), certiorari denied, 344 U. S. 886 (November 17, 1952), which upon a full consideration of the question, held that Navajo Indians have no rights in the area. The United States has always asserted exclusive title to this area since the Treaty of 1868. Thus, the Department of the Interior acted in conformity with treaty, statute and court decision. It lacked power to enlarge the reservation. Rather than abusing its responsibilities, in declining to extend the Navajo domain beyond that given by Congress, the Department properly refused to enlarge the reservation by indirect means.[10]

2. There is no conflict presented by the difference between the notice provisions of the Federal Range Code and those of the Utah statute (Pet. Br. 16–17). The provision of the Federal Range Code, 43 CFR 161.11 (Pet. Br. 54), requiring

[9] That title is not open to adjudication in this tort action. Moreover, the claim of petitioners based on original Indian title (see *United States* v. *Hosteen Tse Ani*, 191 F. 2d 518 (C. A. 10)), was resolved against them when this Court held that original Indian title is not a constitutionally protected property interest as against the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272.

[10] For many years Congress has expressly prohibited the enlargement of reservations or changes in their boundaries except by Act of Congress. Acts of May 25, 1918, Sec. 2, 40 Stat. 561, 570; June 30, 1919, Sec. 27, 41 Stat. 3, 34; and March 3, 1927, Sec. 4, 44 Stat. 1347.

service of written notice upon a violator of the prohibition in the Taylor Grazing Act against the unlawful grazing of livestock is not applicable to the facts in this case. As the Court of Appeals correctly held, that provision relates to violations by specific, known owners and "makes no reference to and has no application whatsoever to a program for the elimination of abandoned stock on the federal range" (R. 434). Contrary to petitioners' assertions (Br. 17, 31–32), the owners of the animals involved here were not known in the sense referred to by the Range Code, which deals with service of written notice "in person or by registered mail" upon a *named* violator setting forth "the act or acts constituting such violation" (Pet. Br. 54). The District Court found that the employees of the Government knew that the horses "belonged to plaintiffs or to some of them" (R. 36). As that finding indicates and as the Court of Appeals stated, the most which the evidence supports is that (R. 432) "It was generally known to those who were rounding up the animals that they belonged to Indians * * *." (See R. 81, 99–100, 120–121, 293–299, 332, 342–348, 345–346, 388.) Some of the petitioners themselves did not know at the time to whom the horses belonged (R. 141–142, 299, 309). They offered no records to sustain their assertion that the animals bore recorded brands (R. 432). A search of the records by government employees showed that no brands

were registered (R. 147, 292–298, 309–310, 333, 432). Petitioners' insistence that the written notice provisions of the Federal regulations are applicable to this case would render elimination from the Federal range of abandoned animals difficult if not impossible as a practical matter in cases, like this, where the officials do not know the specific owners of the individual animals. Petitioners' reference (Br. 21) to previous instances of serving written notice in the case of bands of sheep attended by herders is plainly inapposite.

The sole pertinency of the regulation against specific, known violators is the fact that it shows the policy and practice to invoke local procedures in protecting the range. The Government did not proceed under that regulation. As we have just shown, it was plainly not applicable. Petitioners' insistence that the Government was bound by that regulation to use the local impoundment law relative to "estrays and trespassing animals" is as inappropriate to the situation here as their insistence upon use of the written notice provisions. As the Court of Appeals held (R. 434), the Government was required to proceed against abandoned horses. It used the local law relating to abandoned horses. That law is also an impoundment law. The Government was not required to invoke a law relating to a subject other than that with which it was dealing.

Likewise, the presence in the Taylor Grazing Act and regulations issued thereunder of a penalty of $500 for violations of the provisions of the Act or regulations was not intended to nullify the authorized enforcement of state police power. The $500 fine relates to violations by known persons. As the Court of Appeals held (R. 434), it has no relevancy where it is necessary to proceed "against the livestock."

3. Petitioners' assertion (Br. 22) that there is nothing in the Taylor Grazing Act authorizing the Secretary of the Interior "to rely on state enforcement machinery of any kind in the administration of that measure" is without merit. The Secretary is authorized by the Act to do all things necessary to effectuate the purposes of the Act (Sec. 2, 43 U. S. C. 315a; Pet. Br. 52). The Court of Appeals properly held (R. 434) that that is authority to use existing, customary, orderly procedures. Certainly, under the power expressly reserved to the state, the Secretary could invoke state power to stop a "range war", to prohibit the illegal cutting of forage, or to halt the stealing of cattle. Those matters all have a relation to the orderly control, preservation and administration of the range. The persistent nuisance of abandoned horses and its abatement is in no different category.

4. Contrary to petitioners' contention (Br. 16–22), the police power which the Taylor Grazing Act reserved to the states is not so "narrow"

as to exclude the use of state law in the abatement of the nuisance of abandoned horses on the federal range. As the Court of Appeals said (R. 435): "We find nothing in the Taylor Grazing Act that suggests an intent to suspend local law which is not in conflict with the provisions of the Act or the regulations promulgated thereunder." It has been shown above that there is no conflict with respect to preference rights or notice provisions, as urged by petitioners, and there is certainly no conflict in general subject matter. It is true that the Taylor Grazing Act deals with preservation of the range and control of grazing thereon, and that abandoned horses graze and ruin the range. But that Act does not treat specifically the problem of abandoned animals, and there are attributes of such animals which have caused them to be dealt with in a different way from other trespassing animals. There is no owner to proceed against. Abandoned animals are totally uncontrolled, unlike animals in which an owner, even though a trespasser, has an interest. They constitute a greater menace to health by infectious diseases and to property by entering enclosures and roaming wherever they will, both on and off the open range. By the very fact of their abandonment, they generally have undesirable attributes (which they may pass on by contagion or breeding) or are otherwise worthless. The State of Utah has treated them as a serious type

of nuisance, along with brothels (Br. 23), and has declared them to be "a public menace" and condemned them as such (R. 436). The abatement of such a nuisance is an exercise of the state's policy power in the "narrow" sense as defined by petitioners. Accordingly, even under petitioners' own theory, the action here was authorized by the Taylor Grazing Act.

The decisions relied upon by petitioners (Br. 19–21) are not contrary to that of the Court of Appeals in this case. *Noh* v. *Babcock*, 21 F. Supp. 519 (D. Idaho), reversed, 99 F. 2d 738 (C. A. 9), merely held that, after the Taylor Grazing Act, Idaho could no longer control the relative amounts of grazing between sheep and cattle on the federal range. *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, held that the state could no longer control intrastate railroad rates after seizure by the United States under an act which, although reserving to the state "taxation and lawful police regulations," expressly authorized the President to fix such rates. *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, held that, notwithstanding the same reservation to the state, it could not control local telephone rates after seizure by the United States under a statute which, the court held, gave "a right in the President to take complete possession and control to enable full operation of the lines" and embraced "the entire business and the right to the entire revenues" (pp. 184–185). In those cases,

the full purposes of the statutes could not be accomplished without exclusive federal control over the subject matter involved.

B. THE PROVISIONS OF THE UTAH STATUTE WERE FOLLOWED

1. *The Board of County Commissioners of San Juan County authorized the elimination program.*—Here again, in conformity with its conviction that the Federal Range Code was not followed because of a calculated plot to destroy the Indians, rather than, as shown, because it did not apply, the District Court saw ulterior motives in each step of the procedure which was followed under the Utah statute. This attitude resulted in findings and conclusions adverse to the Government which derive only from making small irregularities meaningful and of large consequence when the plain fact is that, even viewed as the court desired to view them, they could not have advanced the plot which the court found. The findings and conclusions are contrary to a reasonable view of the facts taken as a whole and overlook entirely the presumption of regularity of official acts done and approved here by the agencies of two governments. *Great Northern Ry.* v. *Washington*, 300 U. S. 154, 161.

The District Court held that the round-up and elimination of the horses and burros was not in accordance with the Utah statute because no resolution authorizing it "was ever passed" (R. 42). This was based upon a finding that the matter

"was not considered at any meeting of said Board except at its meeting of September 2, 1953 [1952], after the notices had been published" and upon a conclusion that the resolution appearing in the minutes of that meeting was "a statement, not amounting to a resolution," and "was no more than a belated and ineffective attempt to endeavor to shield defendant from the consequences of its own unlawful acts" (R. 32, 42–43). The court further relied upon the fact that the Advisory Board, named in the resolution as the agency engaged to carry out the elimination program, did not officially approve the activity until October 9, 1952, after a number of the horses had been killed (R. 43).

The sole factual basis for those findings and conclusions relative to the actions of the Board of Commissioners was that the minute of the Board's meeting of July 1, 1952, do not show that a resolution authorizing the program was passed on that date and that the date of July 9, 1952, on the resolution appearing in the minutes of the meeting of September 2, 1952, was a date on which there was no meeting (R. 30–34, 42–43, 370–371). It may be conceded, as the Court of Appeals noted (R. 436), that the procedure of the Commissioners in this Utah county does not measure up to the strictest parliamentary practice, but it does not follow that there is any basis for doubt as to what they intended and what they did, nor is there any support for the District

Court's charge of intentionally devious practice. Two of the three Commissioners and the county clerk whose duty it was to keep the minutes testified that the fact that a resolution does not appear in the minutes was due merely to an oversight (R. 148–154, 358–390). The evidence shows that at least three resolutions authorizing the elimination of abandoned horses from this area had been adopted, in 1944, 1947, and 1950, which had not been rescinded and which, it was believed, made an additional one unnecessary, so that all that had to be done was the posting of notices (R. 73, 104, 106, 132, 375, 384–386, 403, 415). Such an elimination program was not an unusual event. It was customary and frequent (R. 98, 104, 106, 119–120, 132). Even so, the undisputed evidence is that the Commissioners unanimously approved, voted on and "passed" a new resolution on July 1, 1952, like "the same resolution that had been passed before," and directed Dale Kinnaman (the Range Manager) and the County Attorney to draw it up in that form (R. 358–359, 375–376, 383, 385–386). Contrary to the District Court's ruling (R. 43, 415), this was not an improper delegation of the Commissioners' authority. The standard was fixed and clear. The resolution was put in writing by the persons designated and was signed by each Commissioner individually on July 9, 1952 (R. 91, 372, 386–387). As the Court of Appeals stated (R. 436), "the record discloses that positive action was taken by the Board in a regular

meeting. The fact that the Board later sought to complete its minutes by inserting a resolution therein would not affect the validity of its previous action."

On the following days, notices of the program, signed by the county clerk (R. 153), were posted and published in exact conformity with the Utah statute. (R. 33, 78–79, 86, 97–98, 111–112, 306–307). The Board of Commissioners paid for the publication of the notices (R. 79, 152–153). The notices were in the English language a fact which the District Court noted disapprovingly (R. 33)—but all prior programs had been noticed in English with the result that most Indian horses promptly disappeared, and that was the case this time (R. 73, 106, 132–134, 335–338). In addition to the written notices, Dee Black testified that "in August and September of 1952, I went down there pretty near continuously in those months, telling the Indians and traders that there was going to be a horse round-up * * *. I have been to Sakezzie's camp several times and told them. * * * Told Jim Hatahley" (R. 133).

After the notices had been posted and published, but before any horses had been rounded up or killed, the Commissioners unanimously voted to insert the resolution in the minutes at the regular meeting of September 2, 1952, to cure the prior oversight in the minutes (R. 32–33, 148–151, 359–361). This was not a mere "statement, not amounting to a resolution" (R. 43). It

was in the form of and entitled a "Resolution" (R. 32). Certainly, it is not reasonable to say that the Commissioners inserted such a document in the minutes without meaning it to be a resolution.

Nothing in the foregoing facts or sequence of events supports the District Court's charge of a vicious plot or its finding that the round-up was not properly authorized under Utah law. Notices were timely posted and published so that it was known to all what was intended. Nothing could have been gained by the manipulation which the court conceived respecting the resolution.

Moreover, even taking the court's own view that there had been no discussion or resolution passed on July 1, 1952, the resolution of September 2, 1952, ratified the posting of notices. This was not too late. The Utah statute, not the resolution, created the offense. By the terms of the statute (Section 3, Pet. Br. 56), these horses were "condemned" before the resolution was passed. No right which the statute was designed to protect was infringed by the events which then took place. The world was notified and the Indians were specifically notified. More than the required time elapsed between the notification and the round-up. Nothing more would have been done if the resolution had been reported in the minutes of July 1, 1952.[11] It cannot be disputed

[11] Petitioners' insistence on strict compliance with such a technicality contrasts vividly with their rejection of any legal provision unfavorable to their position. For example,

that the program of eliminating the horses was at all times intended and approved by the Commissioners. Similarly, contrary to the conclusion of the District Court (R. 43), there is no question that the Advisory Board, the agency designated by the Commissioners to conduct the program, approved the action taken. As the Court of Appeals stated (R. 430), the Bureau of Land Management officials asked the Commissioners to inaugurate the program upon recommendation of the members of the Advisory Board (R. 102, 107–109, 113). Moreover, the Advisory Board ratified the action on October 9, 1952 (R. 55, 93), paid some of the expenses (R. 81, 346–347), and, in return, received the money from the sale of the horses as provided by the Commissioners' resolution (R. 32, 81, 94).

It is thus evident that the real ground for condemnation by the District Court of the proceedings under the Utah abandoned horse statute was not these technical deficiencies but its assumption as to the reasons motivating the actions of the members of the Commission and the Advisory Board. This was pure speculation since the facts relied on have no real tendency to discredit the good faith of those persons in their attempted invocation of the statute.

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they refused to comply with the redemption provisions of the Utah statute, with the provisions of the Taylor Grazing Act regarding use permits, and with the state court injunction against further trespassing in the area.

2. *The horses and burros were abandoned within the terms of the Utah statute.*—Petitioners rely on findings by the District Court that the horses bore recorded brands and that the ownership of these horses was known. They contend, therefore, that the Utah statute concerning abandoned horses could not properly be invoked (Br. 31–33). The contention lacks merit. The findings by the District Court contain express qualifications which prevent their supporting the conclusion urged, and the evidence would not support unqualified findings that there were recorded brands and a knowledge of ownership. Moreover, as the Court of Appeals held (R. 437–438), even if there were recorded brands and a knowledge of ownership, the petitioners were required to follow a prescribed procedure to identify and reclaim their animals, which they did not do; accordingly the "actual knowledge of the ownership * * * is not material and the Utah statute is clear on the subject."

An abandoned horse or burro is defined by the Utah statute (Section 1, Pet. Br. 55) as follows:

> * * * any * * * animal of the genus equus, unbranded, or if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not

> bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded.

The statute presumes that such an animal may have an owner by providing detailed procedures for the "owner to reclaim it" (R. 436–437). Title 3, Chapter 5, Section 115, Utah Code Annotated (1943), *infra*, pp. 70–71, requires branding and the recording of brands, and Section 116 provides: "It is unlawful to brand and mark any livestock in this state with a brand and mark unless such brand and mark is recorded." Sections 122 and 123, *infra*, p. 71, provide that the owner shall keep a certified copy of the recordation and that such copy "shall be prima facie evidence of the ownership of such animal or animals * * * and shall be taken as evidence of ownership in all courts of law or equity or in any criminal proceedings when the title to the animal is involved or property to be proved."

Petitioners alleged in their complaint that the animals sued for were owned by them and "were plainly marked and branded" (R. 6). The Government denied those allegations (R. 9). In addition, it set forth the Utah statutes relative to branding, recording and elimination of abandoned horses as justification for the action taken (R. 10–15).

At the trial, petitioners testified that the animals were branded and that the brands were recorded

(R. 201, 246, 252).[12] The Government's witnesses testified that only a few were branded and that a check of the records showed that none of the brands were recorded (R. 147, 293, 294, 295, 297, 298, 309–310, 333). The District Court found as a fact that the animals "were plainly branded, and some of the brands thereon were duly recorded" (R. 38). But in its conclusions of law it went further, stating that they "were not unbranded, but they were branded and with brands recorded and decipherable" (R. 44).

We submit that this state of the record provided an insufficient basis upon which to charge the Government with unlawful conduct. The *ipse dixit* of the petitioners that the animals were branded and that the brands were recorded is meager proof of the fact when records are available and required by law. It cannot reasonably sustain their case or overcome the defense by the Government under the Utah statute.

The Government—though, of course, the burden of proof was upon petitioners—produced oral testimony that the animals in question bore no brands or unrecorded brands. *Supra*, pp. 26–27, 39. Petitioners were permitted to prevail upon a mere counter-assertion, when the records they claimed to exist would have been readily available

[12] Petitioner Bill Hatahley acknowledged that some of his animals carried brands used only on the reservation (R. 246). A search by an Indian Service official and Dee Black showed that such brands were "not registered" (R. 310).

and would have been conclusive. Indeed, petitioners conceded that the owner's certified copy of the recordation of the brand is the best evidence (Br. 32), and it was only because the Government did not object that the oral testimony of petitioners was even admitted. Against the state, under the authority of which the round-up was conducted, a showing of recorded brands was necessary because by the foregoing statutes a horse on the open range without a brand or bearing an unrecorded brand is declared condemned and the owner is in violation of the law. A full showing of compliance with state law was particularly important here if petitioners were to avoid resting on an unlawful status as the basis of their claim against enforcement of state law dealing with that very status. Petitioners did not sustain the burden of proof required.

The error of permitting such meager proof to overcome the Government's defense under the Utah statute is shown by the fact that the ruling, in practical effect, nullifies that statute. Sections 4 and 6 of the statute place the burden upon all owners of horses running on the open range to establish ownership by furnishing a description of all their horses "and the brands or marks thereon." (Pet. Br. 57, 58). The notices in this case announced that requirement (R. 31). It was not complied with by petitioners. Under the ruling of the District Court, a mere assertion of branding and recording can render a program

of elimination of abandoned horses under the statute illegal and tortious. The ruling misplaces the emphasis of this statute and other statutes of Utah dealing with the subject of branding by putting the alleged owner, rather than the state, in a favored position with respect to proof. It accords nothing to the presumption of the regularity of official acts. It seriously minimizes the importance of branding of animals on the wide ranges of the west.

The District Court's finding, upon which petitioners rely (Br. 31), that the agents of the Government knew to whom the horses belonged was not unqualified. It found that they knew the horses "belonged to plaintiffs or to some of them" (R. 36). We have shown, *supra*, p. 26, that the Court of Appeals correctly regarded that finding and the evidence on which it was based as establishing only that the agents of the Government knew that some of the horses which were roaming the range doubtless belonged to some Indians.

The Court of Appeals was further correct in ruling that the Utah statute does not require that any inquiry be made as to ownership (R. 437–438). It is evident that such a burden upon the enforcement officials in this extensive country would probably defeat use of the statute. The notice provision (Section 4, Pet. Br. 56–57) and the repossession provision (Section 6, Pet. Br. 58) are explicit in requiring the owners, after the notice and advertisement, to initiate a prescribed

procedure to protect their interests. It is noteworthy that the agents here went beyond the requirements of the statute in personally advising petitioners in advance of the round-up to protect their interests (R. 133). Dee Black made a special effort to return horses to two Navajos (R. 144-145, 299). The horses of several Ute Indians were returned (R. 83, 89, 117, 142, 144). These facts contrast significantly with the District Court's repeated assertion that "The plan was to leave no live horses whatever in the ownership or possession of plaintiffs or others of their band of Indians" (R. 33–35, 42–45).

Similarly without support is the District Court's assertion that it was intended "to get the horses killed or out of the County as rapidly as possible to avoid the possibility that plaintiffs should find them and take possession of them, much less to make any endeavor whatsoever to return these animals to their owners" (R. 33–34, 44). The statute provides for the killing of such horses (Sections 1 and 5; Pet. Br. 55, 57). The animals were not removed from the county rapidly, but were held in corrals for periods as long as two weeks (R. 135, 136). They were gathered from the range gradually over the period from September 19, 1952, to the institution of this suit on March 20, 1953 (R. 7, 29, 72, 82–83). Petitioners watched many of them being "trucked past the trading post" throughout that period (R. 195, 261, 270).

C. THERE WAS NO DENIAL OF CONSTITUTIONAL PROTECTIONS

Petitioners argue (Br. 34 *et seq.*) that even if "the provisions of the Utah abandoned horse statute were fully complied with," its application to them in this case was unconstitutional. Postponing the obvious point that an unconstitutional exertion of state authority could scarcely warrant the imposition of liability upon the Federal Government (see *infra*, pp. 47–53, 56–57), we note here that the argument was in any event properly rejected by the court below.

The claim that "the notice prescribed by the Utah statute was so inadequate as to amount to a deprivation of due process" (Pet. Br. 34) is without factual substance. As we have shown (*supra*, pp. 5–6, 19, 23–25, 33, 34, 41–42), petitioners had ample notice from Dee Black, from observing the round-up, from the statutory notices, from prior court action and from repeated warnings for several years. The decisions relied upon by petitioners contain no such record of actual notice as that present in this case.[13]

The record does not support petitioners' charge of discrimination against them (Br. 39–41). The fact that they were not given permits after 1946 because of their refusal to abide by the terms of

[13] Petitioner Hosteen Sakezzie testified to actual notice as follows (R. 181): "Yes, my horses were in the corral during the day, because he may be picking up horses right along through those areas. I put my horses in the corral during the day, and put them out to feed in the night time, when everything gets quiet."

the prior permits, *supra*, pp. 23–24, is not unjustified discrimination. The fact that only 11 horses belonging to white owners were killed (R. 120) may be explained by the smaller number of such horses loose on the range without authority and by obedience to the notices of the round-up. Petitioners made no attempt to follow the redemption provisions of the statute. The assertion of discrimination (Br. 40–41; R. 34–35), in that five horses were returned to white owners while no effort was made to learn the ownership of the Indian horses or to return them, is made without any recognition of differences in compliance with the procedures of the statute.

Similarly, as to the differences in the fees charged, the statute fixed the fee upon repossession as "the expense of caring for the [horse] from the date of capture." Petitioners' reliance on the District Court's statement (Br. 40–41; R. 35) that the return of five horses to white owners for a fee of $2.50 per head contrasted significantly with the charge of $60 per head for horses of one of petitioners is without supporting basis in the evidence as to time, distance, feed, or other possible elements of expense making the two situations comparable. Moreover, apart from the Utah statute, this statement overlooks the charges made to all for use of the federal range (R. 128, 311).

Finally, petitioners' charge of discrimination is based upon their own failure to follow the re-

quirements of both Federal and State law, and licence cannot justify the judgment of the trial court holding the Government liable in tort. Petitioners, merely because they are Indians, cannot claim exemption from the laws applicable to other citizen graziers.

III

IN ANY EVENT, PETITIONERS' OBJECTIONS TO INVOCATION OF THE STATE'S POLICE POWER TO CLEAR THE RANGE OF INJURIOUS ANIMALS PRESENT NO BASIS FOR HOLDING THE UNITED STATES LIABLE UNDER THE FEDERAL TORT CLAIMS ACT

The Court of Appeals has unanimously held that the actions of the range officers in this case, under the aegis of the state police authority they invoked to help take care of the range, were in all respects lawful—that it was proper to seek the aid of the state's police power and that this power was lawfully employed. Devoting the bulk of their brief to this holding, petitioners necessarily recognize that, if correct, it disposes of their claim at the threshold.

But even if petitioners were to prevail on this point—even if they could show that the range officers and the Court of Appeals erred in believing that the Utah statute was lawfully applicable and applied in this case—the result would not be a claim cognizable under the Federal Tort Claims Act. For petitioners are faced at this point with the following dilemma: If the conduct of which

they complain was within the range officers' scope of employment—as we believe it was, and as petitioners must, of course, show at the outset to invoke the Tort Claims Act (28 U. S. C. 1346 (b))—then the intentional conception and execution of the plan to employ the state's police power is the kind of action for which neither the Government's employees directly nor the Government derivatively may be held liable under general law or the Tort Claims Act. *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2); certiorari denied, 339 U. S. 949; *Dalehite* v. *United States,* 346 U. S. 15, 59–60 (dissenting opinion). And this is so whether the execution of the operation be viewed as state or as federal action (cf. opinion below, R. 433, fn. 4). If, on the other hand, the actions were, as petitioners sometimes seek to show, wholly unlawful and unauthorized, and "wanton and willful" (Pet. Br. 45), to boot, the suit must fail because such actions would fall outside the scope of the employment of government agents.

A striking ambiguity in petitioners' arguments in this Court reflects this dilemma. In their petition for certiorari (p. 2, fn. 2), they observe, citing a concession they not only accept but insist upon (R. 64), that there is "no question here as to the authority of the Government agents to take the action complained of by petitioners." Thereafter, however, they never undertake to make—we think they could not make—a showing, essential to their case, how the very action these Gov-

ernment agents were authorized to take could be tortious, *i. e.*, "negligent or wrongful" within the Tort Claims Act. Instead, in both their petition and their brief on the merits they devote themselves wholly to arguing that the actions were not authorized and could not have been authorized. Here, again, their contentions of deliberate "taking and destruction" lead them directly outside the Tort Claims Act.

1. If, as petitioners correctly stated in their petition for certiorari, the Government's agents were authorized to take the action which has been made the basis for this suit, it is difficult to see how this action may be deemed "negligent or wrongful" under the Tort Claims Act. There is, of course, no assertion of negligence; the alleged tort is said to exist because the range officers deliberately and purposefully did what they did. And the additional word "wrongful" in the Act, designed only to eliminate doubt in a relatively small penumbral area which "negligent" might not have covered (*Dalehite* v. *United States*, 346 U. S. 15, 45), can scarcely apply to intentional actions a government employee may lawfully take, even assuming it could extend in any case to the intentional tort of conversion. On petitioners' own statement of their position, therefore, this would seem to be a situation in which both the majority and dissenting Justices in *Dalehite* would apply the exception in 28 U. S. C. 2680 for "governmental functions" (majority,

(p. 32) or an exertion of "governmental authority in a manner which legally binds one or many" (dissent, p. 59).

Thus, the Court in *Dalehite* said (pp. 32–33):

> One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions. Negligence in administering the Alien Property Act, or in establishing a quarantine, assault, libel, fiscal operations, etc., was barred. * * * [Section 2680 (a)] excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused." Not only agencies of government are covered but all employees exercising discretion. It is clear that the just-quoted clause as to abuse connotes both negligence and wrongful acts in the exercise of the discretion because the Act itself covers only "negligent or wrongful act or omission of any employee," "within the scope of his office" "where the United States, if a private person, would be liable." 28 U. S. C. Sec. 1346 (b). The exercise of discretion could not be abused without negligence or a wrongful act.

Elsewhere, the Court noted that Congress intended "to assure protection for the Government against tort liability for errors in administration" (pp. 26–27), to preclude "liability arising from

acts of a governmental nature or function" (p. 28), and "that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable" (p. 36)." And the exception, the Court said (p. 35), "includes more than the initiation of programs and activities."

While the Court divided in *Dalehite*, the area on which majority and dissent agreed seems sufficient to show that a government employee intentionally taking action of this type he is authorized to take commits no tort for which either he or the Government may be sued. The dissenting opinion said (pp. 59–60 [footnotes omitted]):

> When an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such official shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits. For example, the Attorney General will not be liable for false arrest in circumstances where a pri-

"It may be recalled in this connection (see pp. 5, 33, *supra*) that the Utah abandoned horse statute had been invoked repeatedly at earlier times and in other places than those involved here. This course of proceeding plainly reflects departmental judgments higher than those of the particular range officers whose conduct is now in question.

vate person performing the same act would be liable, and such cases could be multiplied. The official's act might inflict just as great an injury and might be just as wrong as that of the private person, but the official is not answerable. The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official.

Taking only this narrower view of the exemption, we think it makes clear that petitioners have no claim under the Tort Claims Act for the actions which they themselves recognize to have been "authorized." The range manager in this case was unquestionably charged with the duty of protecting and controlling the use of the range embraced within Grazing District No. 6. When confronted with the presence of hundreds of horses whose owners had unlawfully left them to roam the range, his duty plainly required action to remove them. As part of his official responsibility, he determined that a Utah statute and Utah official action could lawfully and effectively be invoked for this purpose, and the Court of Appeals for the circuit which includes Utah has unanimously agreed with him.

But if the range manager and the Court of Appeals erred, it by no means follows that petitioners have a claim upon which relief can be granted under the Tort Claims Act. On the contrary, the line of cases approved in the

Dalehite dissent (346 U. S, at 59, fns. 15 and 16) marks out the clear barrier to this suit. Those cases show that, at least where an official is acting nonministerially and "within the scope of his powers" (see *Gregorie* v. *Biddle*, 177 F. 2d 579, 581 (C. A. 2), certiorari denied, 339 U. S. 949), a mistake of law or fact in the exercise of these powers affords no basis for a tort action against the official. The immunity applies, not only where property is injured or destroyed, as here (*e. g., Otis* v. *Watkins*, 9 Cranch 339), but even where the official action effects bodily harm or restraint which would plainly be tortious if caused by a private individual (*e. g., Gregoire* v. *Biddle*, *supra*; *Wilkes* v. *Dinsman*, 7 How. 89). Because of the deep-rooted public policy which precludes efforts to reexamine governmental decisions in tort suits, the rule has been held applicable even where the action complained of is taken "maliciously and wilfully," "from personal spite," and with "no legal warrant." *Gregoire* v. *Biddle*, *supra*, at 580. And "[t]he exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official." *Dalehite*, *supra*, at 60 (dissenting opinion); see also *Feres* v. *United States*, 340 U. S. 135, 141.[15]

[15] Many decisions in addition to those we have cited support the doctrine of official immunity discussed in the text. *Kendall* v. *Stokes*, 3 How. 87; *Spalding* v. *Vilas*, 161 U. S. 483, 498–9; *Standard Nut Margarine Co.* v. *Mellon*, 72 F.

Insofar as the immunity requires that the conduct in question be within the general scope of the official's powers, this obviously cannot aid the petitioners. In the first place, the requirement is satisfied by petitioners' acknowledgment that the range officers had been authorized to do what they did in this instance and numerous others. Moreover, this premise is a necessary condition at the very outset of petitioners' action to recover in tort for acts of a government employee "while acting within the scope of his office or employment" (28 U. S. C. 1346 (b)). See pp. 54–57, *infra*. And it is clear, in any event, that the immunity is not destroyed at the only point where it ever becomes relevant—namely, where the officer or employee has erred and has thus overstepped the bounds of his lawful authority.[16]

2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Glass* v. *Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Lang* v. *Wood*, 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Burns* v. *Spiller*, 161 F. 2d 377 (C. A. D. C.), certiorari denied, 332 U. S. 792; *Laughlin* v. *Garnett*, 138 F. 2d 931 (C. A. D. C.), certiorari denied, 322 U. S. 738; *Phelps* v. *Dawson*, 97 F. 2d 339 (C. A. 8); *Yaselli* v. *Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503.

[16] The immunity is not destroyed because the injury of which the plaintiff complains may amount to a deprivation of constitutional rights. *Gregoire* v. *Biddle*, *supra*. And see the exclusion from the Tort Claims Act of any claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, *whether or not such statute or regulation be valid* * * *." 28 U. S. C. 2680 (a) (emphasis added).

In short, the central point of petitioners' case—that though authorized to act as they did, the range officers guessed wrong as to the effect of the Taylor Act on Utah's police power or acted in accordance with legally imperfect state procedures—defines a clear instance where the tort recovery they seek is unavailable. The legitimacy of the assertedly wrong determination is reflected in the decision of the court below, which found the administrative judgment and action lawful, and so had no occasion to go further. But if this Court should disagree with that limited ruling, there remains the obstacle that the Tort Claims Act does not authorize suit against the United States on the ground that a government agent mistook his legal powers in deliberately choosing the means for performance of a duty of the calibre of the responsibility for keeping the range clear.[17]

Petitioners argue (Br. 34 *et seq.*) that, assuming "the provisions of the Utah abandoned horse statute were fully complied with," it was nevertheless unconstitutional in its application to them. It would be difficult to find a clearer case of state action than the one presented in this argument, so that, even apart from cases like *Gregoire* v. *Biddle*, any supposed basis for a claim against the Federal Government is lacking. Cf. pp. 56–57, *infra*.

[17] The area of official immunity on which all members of the Court agreed in *Dalehite* does not appear to be affected by the recent decision in *Indian Towing Co.* v. *United States*, 350 U. S. 61. In this later case, where the alleged tort was one of negligence, the Government conceded that the "discretionary function" exception in 28 U. S. C. 2680 (a)—in the sense in which it was applied in the first part of the

2. While much of their argument goes to the asserted legal errors of the range officers, petitioners also describe the conduct for which they sue (as did the District Court) as having been part of a deliberate, "preconceived plan" (Br. 8), executed by "wanton and willful" acts (Br. 45), to force the Indians off the range. These characterizations leave intact, we believe, the immunity already discussed. See *Gregoire* v. *Biddle, supra*, p. 51. However, insofar as the unning theme in petitioners' argument claims wanton and malicious conduct, evilly motivated, and heedless of the bounds of official duty and authority, this premise too is inconsistent with recovery under

Dalehite majority opinion—was inapplicable (see 350 U. S. at 64), but argued for a "governmental function" exception on the ground that the activity in question (lighthouse keeping) was not one performed by private persons, so that the suit did not meet the provision in 28 U. S. C. 2674 that the Government's liability is to be like that of "a private individual under like circumstances * * *." Cf. *Feres* v. *United States*, 340 U. S. 135. This Court recognized that the decision whether to operate a particular light was an exercise of discretion (p. 69), but held that, once undertaken, the activity required due care at the risk of liability under the Tort Claims Act. Here, by contrast, it is the very undertaking of the activity which is asserted to be tortious—*i. e.*, the intentional taking of regulatory action where there was authority "to take the action complained of" (Pet. 2, fn. 2). Under both *Dalehite* and *Indian Towing*, this falls within the exception in Section 2680 (a) for "the exercise or performance * * * [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

the Tort Claims Act. For though an individual happens to be a government officer or employee, his deliberate undertaking of a wholly unauthorized venture to the injury of others, unfounded in any real or supposed official authority, could scarcely be deemed to be "within the scope of his office or employment," as the Tort Claims Act requires.

At least in Utah, where the events in this case occurred,[18] it seems clear "that a principal is not liable for the willful tort of an agent which is committed during the course of his employment unless it is committed in the furtherance of his employer's interests or unless the employment is such that the use of force could be contemplated in its accomplishment." *Barney* v. *Jewel Tea Co.*, 104 Utah 292, 296. Stated otherwise, the familiar rule enforced in Utah is that "if the agent go beyond the range of his employment or duties, and of his own will does an unlawful act injurious to another, the agent is liable, but the master or employer is not." *Sweatman* v. *Linton*, 66 Utah 208, 213. Though we have urged that they are mistaken in this, much of petitioners' argument is designed to show that the conduct of which they complain falls within the foregoing description. If they were right, and even assuming the official immunity discussed above might be unavailable to the individual officers themselves,

[18] Local law is controlling on this point. *Williams* v. *United States*, 350 U. S. 857.

this suit against the United States would fail for want of a basis for *respondeat superior* liability.[19]

Another avenue leads to the same conclusion. Petitioners contend that the range officers had no authority to invoke Utah's abandoned horse statute.[20] It is a fact, however, that the range officers did so and that, as the court below held, the round-up and disposition of the horses were conducted under the direction and asserted authority of the Board of County Commissioners. If, as petitioners claim, the federal range officers lacked federal authority to place themselves in this role, it follows once more that they were outside the scope of their federal employment. Similarly, any supposed departures by the County Commissioners from the procedures prescribed for enforcing state law would appear to be state rather than federal action. Accepting petitioners' views, the range officers were, without federal authority, acting in effect as deputies of the state. Under

[19] The exception from the Tort Claims Act of a whole series of intentional torts involving malice and wilfulness (see 28 U. S. C. 2680 (h)) shows that Congress did not conceive of wanton and wilful misconduct of government employees as within the scope of their employment.

[20] To the extent that the mere fact of calling upon Utah's law and officials for assistance is in itself an asserted basis of liability, the claim would appear to be defeated by the exception in the Tort Claims Act for claims based upon malicious prosecution or abuse of process. 28 U. S. C. 2680 (h). Of course, petitioners rest mainly, not on the invocation of state power, but on what was done thereunder, a matter on which the discussion which follows is pertinent.

the Tort Claims Act, as under tort law generally, an employee is outside the scope of his employment when he is thus engaged in the business of another. *Sanchez* v. *United States*, 177 F. 2d 452 (C. A. 10); *Fries* v. *United States*, 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Gleason* v. *Salt Lake City*, 94 Utah 1.

IV

ASSUMING LIABILITY, THE DAMAGES AWARDED BY THE DISTRICT COURT ARE EXCESSIVE

Though it absolved the Government of liability and thus had no occasion to consider any question of damages in detail, the Court of Appeals pointed out (R. 433) "that the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered * * *." It seems clear upon consideration of the record that this observation was fully justified and that the prohibition against holding the United States liable for punitive damages (28 U. S. C. 2674) was transgressed by the District Court.

In its computation of damages, the District Court said it was weighing the value of the horses, consequential losses, and mental pain and anguish (R. 39–41). Reflecting the lack of any attempted precision in this computation, the award was in a lump sum of $100,000 (R. 47, 50). There was no finding as to the amount

awarded for each element of the damages allowed. There was no amount awarded to each petitioner. Although each petitioner suffered a different amount of each element of the damages allowed, no basis was furnished for arriving at the award in that respect or for apportioning the award among the petitioners. All the damages were premised upon "intentional, wanton, malicious acts of defendant" (R. 41). We submit that these damages are based upon erroneous considerations and are excessive for the following reasons:

1. *The horses and burros.*—The Government adduced the following evidence as to value: Fifteen horses were sold locally to individuals at prices from $5 to $30 each (R. 144, 333–334). The rest of the horses and burros were sold to the Kuhni Packing Company at the going rate of from 1 1/15 cents to 3 cents per pound delivered (R. 93, 140–141, 142–146, 293–296). This was done after inquiry revealed that it was the highest price obtainable for immediate sale (R. 139–140, 146, 338–339).[a] There were many horses, of the same type and better, available for sale at the time (R. 339). The value of such horses as these is from $5 to $25 (R. 381, 397). The

[a] The Utah statute relative to eliminating abandoned horses requires use of the "most effective and economical" means and authorizes sale of the horses (Section 5). It provides that if an owner has furnished a description of a horse and it is, nevertheless, killed, he "shall receive as damage therefor a sum not exceeding $10 for each animal; *pro-*

District Court expressly excluded this evidence from its consideration, both at the trial and in the findings, because of its erroneous conviction that a plot existed to destroy the petitioners' property, including an advance intention that if they "were able to recover anything the measure of damage would be the glue factory price which defendant would receive for the horses" (R. 33–34, 38, 43–46, 185, 219–227, 269, 283, 338).

In its findings the court considered only the highest evidence adduced by the petitioners, namely, that horses were traded among the Indians for the equivalent of $900 to $1,050 per head,[22] that the rental value of horses "within the State of Utah" is $5 per day, and that the cost of replacing these animals would be $1,000 each[23] (R. 39–40).

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vided, that he has paid all taxes assessed against said animal; *provided further*, that payment of such claims may be made only from proceeds of sales of captured horses" (Section 6). The resolution of the County Commissioners here provides that the Advisory Board "shall pay all costs incident to the removal of said horses" and that all horses "shall become the property of the said Advisory Board" (R. 32). It may be presumed from this that abandoned horses are not generally of much value and that some effort was made to receive a fair value for the horses.

[22] Computed on the basis of trading five cows worth $200 each or from 30 to 35 sheep worth $30 each for one horse.

[23] Computed on the basis of buying a white man's brood mare at the highest cost testified to, keeping it in a corral because of the tendency of such animals to return to their birthplace unless restrained, and feeding it and its colt on hay at $40 a ton for five years (R. 36–40, 241–242, 285–286, 328, 412).

The court's figures of $900 to $1,050 as the trading value of each horse ignore the fact that the very witness, Sakezzie, who testified to those figures stated unequivocally in response to the court's own questioning that the average value of the horses involved here was $300 per head and that he would have sold his horses for that (R. 283–289). The court's figure of $5 per day for renting a horse is the price charged white deer hunters and recreation seekers, includes the saddle, and was testified to by a witness who had "never rented any horses out in that part of the country." (R. 324, 327, 329–330). The figure of $1,000 for replacing a horse is not a proper consideration under the evidence in this case and, without additional facts, it is an insufficient basis for value. Consideration of that sum assumes, against reason and without any evidence on the matter, that the petitioners can be made whole only by replacing every horse and burro, regardless of age or fitness, with a young horse having a long expectancy of usefulness. In addition, it necessarily assumes that there is no market value available. Market value is the required measure of damages for the destruction of personal property in a tort action unless "for special reasons, it is not exact, or otherwise not applicable." 15 Am. Jur. *Damages*, Section 122. The evidence is abundant and undisputed in this case that there was a large number of idle and surplus horses in this area, on the adjacent Indian

reservation and in the next county (R. 104–106, 119–120, 132–133, 245–246, 264, 287, 335–339, 401–404). We have shown, *supra*, pp. 58–59, that there was a general market and market value for horses in the vicinity which the court erroneously declined to consider. There was also a market among the Indians. The evidence is and the court found that horses were "freely traded" among the Indians (R. 39, 267, 283–287). These traded horses were, of course, subject to the same instinct to return to their birthplace as were those involved in this case, but that fact was evidently not a deterrent to trading.

With further reference to the value of Indian horses in a market used by the Indians, the Government repeatedly sought to prove and develop the fact that there was such a problem of surplus horses on the adjacent Indian reservation that the Indian Service was buying large numbers of them at $10 per head (R. 245–246, 287, 335–336, 337–338). In each instance, the court either ruled the evidence out, curtailed it, or expressly excluded it from consideration. This action was in marked contrast to the liberality of the court in receiving, developing, and directing evidence for the petitioners throughout the trial. The rejected evidence was competent and of the utmost materiality to the issue of value. The Government should have been permitted to develop it because it could detract substantially from the values adduced for the petitioners. The exclusion

and curtailment of this evidence was plain error.

2. *Consequential damages.*—The District Court made an award for consequential losses resulting from the destruction of the petitioners' horses and burros (R. 39–41, 43–47, 275, 282, 325–326). The losses of this type recited by the court for which an award was made included cattle, sheep, goats, game, pine nuts, and corn. They also included the increased difficulty in traveling for water, wood, supplies, council meetings, trade, ceremonies, visits and medical care. No amount was stated by the court as its award for these losses. It is evident, however, from the court's concern over the matter that the amount was large.

Many of those items are susceptible of measurement both as to quantity and value. The petitioners offered no evidence of quantity and value.[24] It is plain that the quantity would vary among individuals or families and that the quantity of these items cannot be estimated from the number of horses lost by each, which was the only figure supplied. There was no showing of income before and after the taking of the horses.

[24] A value for cows and sheep was stated in connection with valuing the horses. But no quantities, before and after the loss of the horses, were supplied except as to Sakezzie (R. 194). He did not state a quantity as to the other items. The testimony of Ira Hatch (R. 263) that in 1929 the petitioners owned 13,000 sheep and goats and "today" they own 3,000 does not furnish a basis for computing quantity. The statement of Little Wagon (R. 254) as to how many sheep he has "now" is also insufficient.

There was nothing presented upon which any approximation of the measurable, consequential losses could be based. The proof, therefore, does not support the award for these losses.

3. *Mental pain and suffering.*—The Court made an award for mental pain and suffering (R. 40–41). It did not state the amount. Such an award is allowable in connection with the conversion of personal property only if the act was done willfully or maliciously. 15 Am. Jur. *Damages*, Section 181. As shown above (*supra*, pp. 14–20, 23–25, 26–27, 31–43), the evidence here provides no support for the court's inference of willful or malicious conduct. Moreover, an award for mental suffering, while not susceptible of definite calculation, is subject to review and reversal for excessiveness. *Id.*, Section 183. The court erred in not stating the amount awarded so that it could be reviewed. In addition, it would seem that such damages, which are awarded only in the case of willful and malicious torts rather than torts based on negligence, are punitive and are not recoverable from the United States under the Tort Claims Act. 28 U. S. C. 2674.

V

AS PETITIONERS SUBSTANTIALLY CONCEDE, THE INJUNCTION ISSUED BY THE DISTRICT COURT WAS ERRONEOUS

Although petitioners sought no such relief in this action against the United States for damages

under the Tort Claims Act, the District Court issued a restraining order against the United States and its agents and employees forbidding further interference with petitioners or their livestock in the possession and use of "these public lands, and from taking further action under any of the applicable laws and regulations to dispose of any of said lands or any interests therein" (R. 47–49). Petitioners now concede (Br. 48–49, 50) that the District Court lacked jurisdiction to enjoin the United States, but seek to reinstate the injunction against the government agents. But their plainly sound concession destroys this attempt. The United States *eo nomine* was the only defendant in this action. Had there been power to enjoin this defendant, the injunction against the agents, as the only instruments for action by the Government, might have been permissible as an incidental matter. But the District Court never acquired jurisdiction over the agents individually and there is no basis for reviving its attempted injunction against them.[25]

[25] While it obviously cannot cure the fatal jurisdictional defect they concede, petitioners argue under their discussion of the injunction (Br. 48–49) that there was a "flagrant flouting of judicial authority" in the fact that this round-up was conducted during the pendency of the trespass action of *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C. A. 10). They overlook the fact that the *Hosteen* case was directed principally against the numerous bands of sheep in the area (R. 115). It was conducted under 43 C. F. R. 161.11 (Pet. Br. 54) against some of the petitioners as specifically known trespassers on the federal range. It was not, as were the

It may be observed, furthermore, that petitioners expressly disclaimed any effort to litigate the supposed problem the District Court undertook to preserve by the injunction issued *sua sponte*. The injunction was framed to endure until the court at some future time, on its own volition, might take evidence upon and determine the property rights of the United States and petitioners in and to the area in question (R. 47–49). However, when evidence on the question of title was requested by the court during the trial of the tort issue, counsel for petitioners stated that the question "was not one for which I was prepared when I came into this action, having restricted it to a claim in tort for the taking of the horses" (R. 278). The court acknowledged repeatedly that the "Indian prob-

proceedings here, directed against the abandoned animals of unknown owners. And there was sound reason for concurrently invoking all legal procedures, appropriate to the respective subjects, to rid the range of unauthorized animals during that period of severe drought. The *Hosteen* case was appropriately dismissed when an investigation, requested by the Bureau of Land Management officials in Salt Lake City, showed that the Indians had returned to the reservation with their sheep (R. 115). Even if the Indians returned to the reservation because these horses were destroyed, as contended, that fact does not support a charge of flouting judicial authority. The two actions related to different subject matters. Both actions were legally valid and were required by the condition of the range. It should be noted, moreover, that any use of the land by many of petitioners directly flouts the injunction issued in *Young* v. *Felornia*, 244 P. 2d 862 (Utah), restraining them "from any further use" of the land involved.

lem," including possessory rights, if any, is one for "the executive department of the government," is "not a problem for a court" and "is not necessarily and not directly involved here" (R. 215–227, 274). Nevertheless, after stating that "this lawsuit doesn't necessarily involve the questions about the real estate," the court decided to try the question because "It was always my notion that sometime we ought to try that out" (R. 216, 217).

The court's earlier observations were correct. It lacked power to issue its injunction against anybody.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The Federal Tort Claims Act provides in pertinent part as follows (28 U. S. C.):

Sec. 1346 (b). Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Sec. 2680. The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused.

* * * * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * * * *

The Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U. S. C. 315–315r, contains the following provisions:

Sec. 1. That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands,

and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. * * *

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SEC. 18. (a) In order that the Secretary of the Interior may have the benefit of the fullest information and advice concerning physical, economic, and other local conditions in the several grazing districts, there shall be an advisory board of local stockmen in each such district, the members of which shall be known as grazing district advisers. Each such board shall consist of not less than five nor more than twelve members, exclusive of wildlife representatives, one such representative to be appointed by the Secretary, in his discretion, to membership on each such board. Except for such wildlife representatives, the names of the members of each district advisory board shall be recommended to the Secretary by the users of the range in that district through an election conducted under rules and regulations prescribed by the Secretary. No grazing district adviser so recommended, however, shall assume office until he has been appointed by the Secretary and has taken an oath of office. The Secretary may, after due notice, remove any grazing district adviser from office if in his opinion such removal would be for the good of the service.

(b) Each district advisory board shall meet at least once annually at a time to be fixed by the Secretary of the Interior, or by such other officer to whom the Secretary may delegate the function of issuing grazing permits, and at such other times as its members may be called by such officer. Each board shall offer advice and make a recommendation on each application for such a grazing permit within its district: *Provided*, That in no case shall any grazing district adviser participate in any advice or recommendation concerning a permit, or an application therefor, in which he is directly or indirectly interested. Each board shall further offer advice or make recommendations concerning rules and regulations for the administration of this Act, the establishment of grazing districts and the modification of the boundaries thereof, the seasons of use and carrying capacity of the range, and any other matters affecting the administration of this Act within the district. Except in a case where in the judgment of the Secretary an emergency shall exist, the Secretary shall request the advice of the advisory board in advance of the promulgation of any rules and regulations affecting the district.

Title 3, Chapter 5, Sections 115, 116, 122 and 123, Utah Code Annotated (1943), provide:

3–5–115. Brands—Recording.

Every livestock owner who allows his livestock over six months of age to range upon the open range or without an enclosure, shall have and adopt a brand and shall brand his livestock with such brand,

which brand must be recorded in the office of the state board of agriculture.

3–5–116. Unlawful to Use Unrecorded Brand, or to Disfigure or Remove Brand.

It is unlawful to brand and mark any livestock in this state with a brand and mark unless such brand and mark is recorded.

It is unlawful for any person to obliterate, disfigure, extend, add to, deface or remove a recorded brand or mark.

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3–5–122. Owner to Procure Certified Copy of Recording.

Upon the recording of such brand and mark as provided in this chapter the owner shall procure from the state board of agriculture a certified copy of recording such brand and mark.

3–5–123. Id: Evidence of Ownership of Branded Animals.

The certified copy of recordation thus secured in the foregoing section shall be prima facie evidence of the ownership of such animal or animals by the party whose brand and mark it might be and shall be taken as evidence of ownership in all courts of law or equity or in any criminal proceedings when the title to the animal is involved or property to be proved.

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